

**STERN
SHAPIRO
WEISSBERG
& GARIN LLP**

attorneys at law

RECEIVED

JAN 13 2014

OFFICE OF THE REGIONAL ADMINISTRATOR

Max D. Stern
Jonathan Shapiro
Lynn G. Weissberg
Patricia Garin
Martin E. Levin
Nora J. Chorover
Jeffrey P. Wiesner
Paul S. Sennott
Kathryn Beaumont
John Cushman

Of Counsel
John Taylor Williams
David L. Kelston

January 8, 2014

BY CERTIFIED MAIL

Curt Spalding, Regional Administrator
EPA New England, Region 1,
5 Post Office Square - Suite 100
Boston, MA 02109-3912
Certified # 7011 1150 0000 0300 4209

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Certified # 7011 1150 0000 0300 4223

Gina McCarthy, Administrator
US EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Certified # 7011 1150 0000 0300 4216

Re: Clean Water Action Complaint v. J. Donovan & Son, Inc.

Dear Sirs and Madam:

In accordance with Section 505(c)(3) of the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (c)(3), and 40 CFR 135.4, we are enclosing a conformed copy of a complaint filed by this office on behalf of Clean Water Action against J Donovan & Son, Inc. on January 3, 2014.

Sincerely,

Nora J. Chorover /KMC
Nora J. Chorover

Enclosure

cc: Kenneth Kimmel, Commissioner
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108
Certified # 7011 1150 0000 0300 4230

90 Canal Street Boston, MA 02114-2022
617-742-5800 Fax: 617-742-5858 E-Mail: sswg@sswg.com

NORA J CHOROVER (Bar No. 547352)
Stern, Shapiro, Weissberg & Garin, LLP
90 Canal Street, 5th Fl.
Boston, MA 02114
Phone: 617-742-5800
Fax: 617-742-5858

Filed Electronically 1/8/2014

Attorneys for Plaintiff
CLEAN WATER ACTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Springfield Division

CLEAN WATER ACTION,

Plaintiff,

v.

J. DONOVAN & SON, INC.,

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF AND CIVIL PENALTIES**

(Clean Water Act,
33 U.S.C. §§ 1251 to 1387)

CLEAN WATER ACTION ("CWA") by and through its counsel, hereby alleges:

INTRODUCTION

1. This is a civil suit brought under the citizen suit enforcement provisions of the Clean Water Act, 33 U.S.C. § 1251, et seq. (the "Clean Water Act" or "the Act"). Plaintiff seeks declaratory judgment, injunctive relief, and other relief the Court deems appropriate with regard to actions taken by J. Donovan & Son, Inc ("Defendant" or "J. Donovan") which resulted in the discharge of stormwater runoff from Defendant's construction sand and gravel facility at or around 29 Cherry Hill Road in Stockbridge, Massachusetts (the "Facility"), into waters of the United States, in violation of the Act.

2. Activities that take place at industrial facilities, such as material handling and storage, are often exposed to the weather. As runoff from rain or snow melt comes into contact with these

materials, it picks up pollutants and transports them to nearby storm sewer systems, rivers, lakes, or coastal waters. Stormwater pollution is a significant source of water quality problems for the nation's waters. The Massachusetts Department of Environmental Protection has determined that stormwater runoff represents the single largest source responsible for water quality impairments in the Commonwealth's rivers, lakes, ponds, and marine waters.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the parties and the subject matter of this action pursuant to Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), and 28 U.S.C. § 1331 (an action arising under the laws of the United States).

4. On October 11, 2013, Plaintiff provided notice of Defendant's violations of the Act, and of its intention to file suit against Defendant (the "Notice Letter"), to the Administrator of the United States Environmental Protection Agency ("EPA"); the Administrator of EPA Region 1; the Commissioner of the Massachusetts Department of Environmental Protection ("DEP"); and to Defendant, as required by the Act, 33 U.S.C. § 1365(b)(1)(A).

5. More than sixty days have passed since notice was served on Defendant and the state and Federal agencies. Plaintiff is informed and believes, and thereupon alleges, that neither the EPA nor the Commonwealth of Massachusetts has commenced or is diligently prosecuting a court action to redress the violations alleged in this complaint. This action is not barred by any prior administrative penalty under Section 309(g) of the Act, 33 U.S.C. § 1319(g).

6. Venue is proper in the District Court of Massachusetts pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located within this judicial district. Plaintiff selects venue in the Springfield Division pursuant to Local Rule 40.1(D)(2) because the alleged violations occurred in that division, Defendant is located in that division, and Plaintiff maintains an office in that division.

PARTIES

7. Plaintiff CLEAN WATER ACTION (“CWA”) is a nationwide non-profit public benefit corporation organized under the laws of the District of Columbia, with offices located in Boston and Northampton, Massachusetts. CWA has approximately 50,000 members who live, recreate and work in and around waters of the Commonwealth of Massachusetts, including the Housatonic River and its tributaries. CWA is dedicated to working for clean, safe and affordable water, protection of natural resources, the prevention of health-threatening pollution, the creation of environmentally safe jobs and businesses, and the empowerment of people to make democracy work. To further these goals, CWA actively seeks Federal and state agency implementation of the Act and other laws and, where necessary, directly initiates enforcement actions on behalf of itself and its members.

8. Members of CWA have a recreational, aesthetic and/or environmental interest in Housatonic River. One or more of such members who reside in the Stockbridge area use and enjoy Housatonic River for recreation, sightseeing, wildlife observation and/or other activities in the vicinity of and downstream of Defendant’s discharges. These members use and enjoy the waters into which Defendant has caused, is causing, and will continue to cause, pollutants to be discharged. The interests of CWA’s members have been, are being, and will continue to be adversely affected by Defendant’s failure to comply with the Clean Water Act, as alleged herein. The relief sought herein will redress the harms to Plaintiff caused by Defendant’s activities.

9. Continuing commission of the acts and omissions alleged herein will irreparably harm Plaintiff and the citizens of the Commonwealth of Massachusetts, for which harm they have no plain, speedy, or adequate remedy at law.

10. Defendant J. Donovan & Son, Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts that operates a construction sand and gravel facility in Stockbridge.

STATUTORY BACKGROUND

11. The Clean Water Act makes the discharge of pollution into waters of the United States unlawful unless the discharge is in compliance with certain statutory requirements, including the requirement that the discharge be permitted by the Federal Environmental Protection Agency (“EPA”) under the National Pollutant Discharge Elimination System (“NPDES”). Sections 301(a), 402(a) and 402(p) of the Act. 33 U.S.C. §§ 1311(a), 1342(a), 1342(p).

12. In order to minimize polluted stormwater discharges from industrial facilities, the Federal Environmental Protection Agency has issued a general industrial stormwater permit (“Stormwater Permit”). EPA’s Stormwater Permit was first issued in 1995, and was reissued in 2000 and 2008. See 60 Fed. Reg. 50804 (Sept. 29, 1995); 65 Fed. Reg. 64746 (Oct. 30, 2000); 73 Fed. Reg. 56572 (Sept. 29, 2008).

13. The Stormwater Permit expired on September 29, 2013, but by its own terms was administratively continued after that date and remains in force and effect. Stormwater permit, Section 1.3.2, pg. 9.

14. Mineral mining and dressing facilities are subject to the requirements of this Stormwater Permit. Stormwater Permit, Appendix D, pg. 79-86.

15. Mineral mining and dressing facilities must comply with the monitoring and reporting requirements of the Stormwater Permit. The Stormwater Permit requires these facilities to, among other things:

- a. ensure that stormwater discharges do not cause or have the reasonable potential to cause or contribute to a violation of water quality standards, Stormwater Permit, pg. 16;
- b. conduct monitoring of stormwater discharges at all facility outfalls in each of the first four full quarters of permit coverage for compliance with benchmark limitations applicable specifically to mineral mining and dressing facilities, Stormwater Permit, pp. 36, 79-86;
- c. report all monitoring results for all facility outfalls to EPA by specified deadlines, Stormwater Permit, pg. 41;

- d. conduct corrective action after the average of 4 quarterly samples exceeds the EPA benchmark value, Stormwater Permit, pp. 18, 36;
 - e. conduct routine facility inspections at least quarterly, quarterly visual assessments, and annual comprehensive inspections to, among other things, sample and assess the water quality of the facility's stormwater discharges, ensure that stormwater control measures required by the Permit are functioning correctly and are adequate to minimize pollutant discharge, and timely perform corrective actions when they are not, Stormwater Permit, pp. 18-25;
 - f. timely prepare and submit to EPA annual reports that include findings from the annual comprehensive site inspections and documentation of corrective actions, Stormwater Permit, pp. 24, 41; and
 - g. comply with any additional state requirements, *see* Stormwater Permit, pp. 140-141.
16. Citizens may bring an action to enforce these requirements. Section 505(a)(1) and Section 505(f) of the Act provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), § 1362(5). An action for injunctive relief under the Act is authorized by 33 U.S.C. § 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$37,500 per day, pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365 and 40 C.F.R. §§ 19.1 - 19.4.

STATEMENT OF FACTS

17. Defendant's facility on Cherry Hill Road in Stockbridge includes mining and processing of construction sand and gravel, which falls within the category of mineral mining and dressing (standard industrial classification 1442).
18. Numerous activities at the Facility take place outside and are exposed to rainfall. These include, without limitation, outdoor stockpiling of materials, transportation of materials, mineral processing, and material loading and unloading.

19. Industrial machinery and heavy equipment, including trucks, are operated, maintained, or stored at the Facility in areas exposed to storm water flows.

20. During every rain event, rainwater flowing over areas of the Facility becomes contaminated with pollutants.

21. Plaintiff is informed and believes, and thereupon alleges, that rainwater and snow melt (collectively referred to hereinafter as "Stormwater") flowing over the Facility collects at various locations at the Facility.

22. The polluted Stormwater from the Facility discharges to one or more ponds and wetlands on the northern side of the Facility, which ponds and wetlands are hydrologically connected to the Housatonic River.

CAUSES OF ACTION

First Cause of Action

Discharges of Contaminated Storm Water Without a Permit

23. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

24. Plaintiff is informed and believes, and thereupon alleges, that since at least January 5, 2009, Defendant has been discharging polluted stormwater from the Facility to ponds and wetlands connected to the Housatonic River, in violation of the Clean Water Act. Sections 301(a), 402(a) and 402(p) of the Act, 33 U.S.C. §§ 1311(a), 1342(a), 1342(p).

25. During every rain event, rainwater flowing over exposed materials at the Facility becomes contaminated with pollutants. The rainwater then flows untreated from the Facility into ponds and wetlands at the north of the Facility that are hydrologically connected to the Housatonic River.

26. The days during the last five years on which rain, snow melt or other factors caused stormwater to be discharged from the Facility to these waters are listed on Exhibit A hereto.

27. Every day since January 5, 2009 that Defendant discharged and continues to discharge polluted stormwater from the Facility without a permit is a separate and distinct violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). These violations are ongoing and continuous.

Second Cause of Action
Failure to Comply with a Permit for Industrial Stormwater Discharges

28. Plaintiff incorporates the allegations contained in the above paragraphs as though fully set forth herein.

29. Regulated industrial discharges are required at a minimum to comply with the requirements of the Stormwater Permit, which include but are not limited to:

- a. Developing and implementing a complete and accurate Stormwater Pollution Prevention Plan;
- b. Submitting a complete Notice of Intent to be covered by the Stormwater Permit, accompanied by a complete and accurate Stormwater Pollution Prevention Plan;
- c. Implementing required stormwater control measures;
- d. Conducting facility inspections;
- e. Collecting wet-weather stormwater samples from each outfall at the Facility and inspecting same for indicators of pollution;
- f. Conducting annual comprehensive site inspections and submitting the results thereof to EPA;
- g. Complying with required benchmark monitoring and sampling procedures;
- h. Monitoring for all pollutants for which a receiving waterbody is impaired and for which a standard analytical method exists;

- i. Complying with reporting and recordkeeping requirements, including but not limited to reporting of any noncompliance during an applicable time period;
 - j. Satisfying sector-specific requirements such as, in the case of J. Donovan, requirements pertaining specifically to non-metallic mineral mining and dressing activities.
30. J. Donovan has failed, and continues to fail, to comply with the requirements of the Stormwater Permit, including each of the requirements described above.
31. Each and every day on which J. Donovan has failed to comply with the Stormwater Permit is a separate and distinct violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and Section 402 of the Act, 33 U.S.C. § 1342.

RELIEF REQUESTED

Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

1. Declare Defendant to have violated and to be in violation of the Act as alleged herein;
2. Enjoin Defendant from discharging pollutants from the Facility and to ponds and wetlands surrounding the Facility without a Stormwater Permit;
3. Require Defendant to implement the requirements of the Stormwater Permit;
4. Order Defendant to pay civil penalties of up to \$37,500 per day of violation, pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a) and 74 Fed. Reg. 626, 627 (2009);
5. Order Defendant to take appropriate actions to restore the quality of navigable waters impaired by their activities;
6. Award Plaintiff's costs (including reasonable investigative, attorney, witness, and consultant fees) as authorized by the Act, 33 U.S.C. § 1365(d); and
7. Award any such other and further relief as this Court may deem appropriate.

Dated: 1/8/2014

Respectfully submitted,

/s/Nora J. Chorover

NORA J. CHOROVER (Bar No. 547352)

Stern, Shapiro, Weissberg & Garin, LLP

90 Canal Street, 5th Fl.

Boston, MA 02114

Phone: 617-742-5800

Fax: 617-742-5858

Attorneys for Plaintiff

CLEAN WATER ACTION

CLEAN WATER ACTION'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure and Massachusetts District Court Local Rule 7.3, Plaintiff Clean Water Action states that it does not have a parent corporation and no publicly held company owns 10% or more of its stock.

EXHIBIT A

**DAYS BETWEEN
JANUARY 7, 2009 AND JANUARY 6, 2014
ON WHICH STORMWATER FROM FACILITY
DISCHARGED TO WATERS OF THE UNITED STATES**

| | |
|-----------------|--|
| January 2009: | 7, 8, 9, 12, 29 |
| February 2009: | 11, 13, 19, 20, 23, 28 |
| March 2009: | 3, 10, 12, 27, 30 |
| April 2009: | 4, 5, 7, 11, 12, 21, 22 |
| May 2009: | 7, 8, 10, 13, 15, 16, 25, 28, 30 |
| June 2009: | 10, 13, 14, 18, 19, 21, 22, 25, 26, 27, 28 |
| July 2009: | 1, 2, 3, 8, 12, 13, 17, 18, 19, 22, 24, 25, 27, 30, 31 |
| August 2009: | 1, 11, 13, 22, 23, 29, 30, 31 |
| September 2009: | 12, 13, 28 |
| October 2009: | 4, 8, 10, 11, 14, 19, 25, 29 |
| November 2009: | 1, 15, 21, 29 |
| December 2009: | 1, 3, 4, 5, 6, 10, 14, 27, 28 |
| January 2010: | 3, 18, 26 |
| February 2010: | 3, 17, 24, 25, 26, 27 |
| March 2010: | 14, 23, 24, 26, 27, 29, 30, 31 |
| April 2010: | 9, 17, 26, 27 |
| May 2010: | 4, 5, 8, 9, 13, 14, 19 |
| June 2010: | 2, 7, 10, 11, 13, 17, 23, 25, 28 |
| July 2010: | 11, 15, 18, 20, 22, 24, 25, 26 |
| August 2010: | 6, 10, 16, 17, 23 |
| September 2010: | 9, 16, 17, 28, 29 |
| October 2010: | 1, 2, 5, 6, 7, 15, 16, 28, 29 |
| November 2010: | 5, 9, 17, 26 |
| December 2010: | 1, 2, 7, 13, 27 |
| January 2011: | 8, 12, 13, 19, 22, 25, 27 |
| February 2011: | 2, 3, 6, 7, 8, 9, 21, 25, 26, 27 |
| March 2011: | 1, 7, 11, 12, 17, 22 |
| April 2011: | 2, 5, 6, 13, 14, 17, 18, 20, 23, 24, 26, 27, 28, 29 |
| May 2011: | 4, 5, 16, 18, 19, 20, 22, 24, 25, 27 |
| June 2011: | 9, 10, 11, 12, 14, 15, 17, 18, 23, 24, 25, 29 |
| July 2011: | 4, 7, 8, 14, 19, 26, 27, 30 |
| August 2011: | 7, 10, 15, 16, 20, 22, 26, 28, 29 |
| September 2011: | 5, 6, 7, 8, 9, 16, 21, 22, 23, 24, 29, 30 |
| October 2011: | 2, 4, 13, 14, 15, 20, 25, 27, 28, 30 |
| November 2011: | 15, 17, 23, 30 |
| December 2011: | 6, 7, 8, 22, 23, 28 |
| January 2012: | 2, 12, 13, 14, 17, 18, 22, 24, 27, 28 |

| | |
|-----------------|--|
| February 2012: | 17, 25 |
| March 2012: | 1, 3, 9, 17, 29 |
| April 2012: | 2, 9, 22, 23 |
| May 2012: | 2, 3, 4, 8, 9, 10, 15, 16, 17, 22, 25, 30, 31 |
| June 2012: | 2, 3, 4, 26 |
| July 2012: | 4, 14, 16, 24, 27, 29, 30 |
| August 2012: | 6, 11, 12, 15, 18, 28 |
| September 2012: | 5, 7, 9, 19, 23, 28, 29 |
| October 2012: | 1, 3, 5, 8, 11, 14, 15, 16, 20, 24, 30 |
| November 2012: | 13, 14, 28 |
| December 2012: | 3, 5, 8, 9, 10, 11, 17, 18, 19, 21, 22, 27, 28, 30 |
| January 2013: | 12, 16, 29, 30, 31 |
| February 2013: | 1, 9, 20, 24, 27, 28 |
| March 2013: | 8, 13, 19, 20 |
| April 2013: | 1, 10, 11, 12, 13, 17, 20, 25 |
| May 2013: | 9, 10, 12, 22, 24, 25, 29, 30 |
| June 2013: | 3, 7, 8, 11, 14, 25, 28, 29 |
| July 2013: | 1, 2, 8, 23 |
| August 2013: | 2, 9, 10, 14, 23, 27 |
| September 2013: | 1, 2, 3, 11, 12, 13, 22 |
| October 2013: | 6, 8 |
| November 2013: | 1, 2, 8, 18, 26, 27, 28 |
| December 2013: | 6, 7, 11, 15, 18, 24, 30 |
| January 2014: | 2, 3, 6 |